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Donna Lee, Loftin Lee v. Jeanne W. Howes : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

DONNA LEE, a Minor, by and through her Guardian ad Litem, LOFTIN LEE, Plaintiff/Appellant, vs. JEANNE W. HOWES, Defendant/Respondent.	Case No. 14128

BRIEF OF RESPONDENT

Appeal from Judgment of the Third Judicial District Court of Salt Lake County, Honorable James S. Sawaya, Judge

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NATURE OF THE CASE

This is an action by the minor plaintiff to recover damages for personal injuries allegedly arising out of a motor vehicle-pedestrian accident on November 5, 1973 near the intersection of Mantle Avenue and 2200 West in Salt Lake County, Utah at approximately 6:30 p.m.

DISPOSITION IN THE LOWER COURT

The case was tried before an eight-member jury who answered special interrogatories and found that the defendant was not negligent, which finding had two dissenting jurors, and in addition found that the plaintiff was contributorily negligent. On plaintiff's contributorily negligence the verdict was unanimous. Based upon the jury's answers to

interrogatories the Court entered its judgment on the verdict in favor of defendant and against the plaintiff, No Cause of Action. Thereafter the Trial Court denied plaintiff's Motion for New Trial.

RELIEF SOUGHT ON APPEAL

Defendant seeks affirmance of the disposition reached by the jury and the Court below.

STATEMENT OF THE FACTS

Plaintiff's statement of the facts is essentially correct only pertaining to the time and place of the accident. The facts thereafter are in substantial dispute. As opposed to plaintiff's statement of facts, the facts as developed at trial from defendant's viewpoint are as follows:

The defendant, a 22 year old married woman (Tr. 289) who worked at the Valley Fair Mall, drove home from work alone, never having anyone ride with her. (Tr. 290). On the date of the accident she got off work between 6:00 and 6:30 p.m. It was "very dark" and since one could not see without headlights, she had her lights on. (Tr. 292). The mall is several blocks north of the accident scene. (Tr. 293). Defendant traveled south at 25 miles per hour. (Tr. 293). She went through the intersection of Mantle Avenue and 2200 West without incident (Tr. 294), looked at the speedometer (Tr. 293), a car from the south passed going the other direction. (Tr. 294). At about

the same moment, and while she was in front of a house numbered 4246 on Exhibit D-1 (Tr. 294), the plaintiff darted out from the left of defendant's vehicle, into defendant's path. (Tr. 295). The plaintiff was running fast (Tr. 319) and defendant could do nothing to avoid the collision. (Tr. 295) The plaintiff hit the front of defendant's car, then rolled off the edge, not staying on the car. (Tr. 295). The impact happened just north of the mail box, which was approximately 90 feet south of the intersection. (Tr. 296, Ex. D-1). The defendant fell in about the same location as where the impact occurred. (Tr. 296, 306).

The plaintiff prior to the impact with the auto- had been on the southeast corner of the intersection of Mantle Avenue and 2200 West with six of her friends "goofing around". (Tr. 242). After the plaintiff washed a boy's face with snow he chased the plaintiff, her cousin Julie, and friend Marilyn. (Tr. 244, 323). Both Julie and Marilyn saw defendant's car and stopped. (Tr. 245, 324). Plaintiff, however, never did see defendant's vehicle. (Tr. 195). There was no obstruction preventing her from seeing a car approaching from the north. (Tr. 196).

The damage on the front of defendant's car's hood was "pretty minor". (Tr. 218). The police officer in his report stated that the pedestrian was not crossing within the crosswalk and during his investigation he received no con-

flicting report. (Tr. 217).

Plaintiff's injuries were minor and did not require hospitalization other than emergency room care. (Tr. 170, 178). She had abrasions on her forehead, (Tr. 180) and left elbow. (Tr. 185). The bruises have healed well and she has no discomfort except if she bumps her elbow or hip a certain way. (Tr. 199). The injuries have healed well with no complications. (Tr. 254, 255).

The plaintiff saw her treating physician on November 8, 1973, three days after the accident, again on November 21, 1973, on December 12, 1973 and on February 15, 1974. This was the last time she saw Dr. Larsen until the trial over a year later. (Tr. 169, 170). In the interim, the plaintiff was examined by Dr. Youngblood on March 8, 1974 (Tr. 254) and again just before the trial on March 10, 1975. (Tr. 255).

The jury below answered a special verdict and found that defendant was not negligent. Two jurors dissented to this finding. The jury also found unanimously that the plaintiff was negligent and that her negligence was the cause of her own injuries. The jury further showed their intent by indicating that plaintiff should receive no amount of money for her personal injury or for her medical expense and lost clothing. (R. 93-94). The Court refused to grant a new trial and this appeal then ensued.

ARGUMENT

POINT I

THE VERDICT BELOW IS SUSTAINED BY THE EVIDENCE.

Pursuant to Rule 59(a)(6) and (7), Utah Rules of Civil Procedure, plaintiff seeks a new trial on the basis of insufficient evidence to justify the verdict and error in law. The test as to sufficiency in such cases is whether reasonable minds could be convinced by the facts in evidence which are necessary to support the verdict. Horsley v. Robinson, 112 Utah 227, 186 P.2d 592, 597 (1947). There must be an absence of evidence against the prevailing party below or a decided preponderance thereof in favor of Appellant before the verdict will be set aside. People v. Swasey, 6 Utah 93, 21 Pac. 400 (1889); see also, Efco Distributing, Inc. v. Perrin, 17 U.2d 375, 412 P.2d 615, 617 (1966). As can be readily seen from the statement of facts above there was substantial evidence upon which the jury could support its verdict and from which reasonable minds could be convinced.

As can be seen from the conflicting statements of fact presented by the brief's of Appellant and Respondent herein, there were numerous and substantial conflicts in the evidence produced at trial. As this Court has stated on numerous occasions, conflicts in the evidence must be viewed in the light most favorable to the party prevailing below.

Potter v. Utah Driv-Ur-Self System, Inc., 11 U.2d 133, 355 P.2d 714 (1960). See also: Larson v. Evans, 12 U.2d 245, 364 P.2d 1088 (1961). On the subject of conflicts in the evidence this Court has said:

> But one question is presented on this appeal: are the verdict and judgment sustained by the evidence? No useful purpose would be subserved by setting forth the testimony of the various witnesses. We have read the record carefully. The evidence is in conflict, but the jury could well have come to the conclusion it did. It is not for us to weigh the evidence and substitute our judgment for that of the jury and trial court. In re Gordon's Estate, 101 Utah 523, 125 P.2d 413 (1942).

Considering the issues on appeal, the evidence is viewed most favorably to the prevailing party below, and all reasonable presumptions are in favor of the validity of the verdict. Morris v. Christensen, 11 U.2d 140, 356 P.2d 34 (1960); Gibbons & Reed Co. v. Guthrie, 123 Utah 172, 256 P.2d 706 (1953).

Determination of the credibility of witnesses should belong exclusively to the jury. It is the jury that has the exclusive prerogative of passing upon the credibility of the evidence and of determining the facts. Flynn v. W. P. Harlin Construction Company, 29 U.2d 327, 509 P.2d 356 (1973). In that case this court stated:

> It has long been established in our law that a court should not take the case from a jury where there is any substantial dispute in the evi-

> dence on issues of fact, but can properly do so only when the matter is so plain that there really is no conflict in the evidence upon which reasonable minds could differ. (Citations omitted). As was said for this Court long ago by a greatly respected Justice Frick: ". . .unless the question is free from doubt, the Court cannot pass upon it as a matter of law. . . -- . . . if . . . the Court is in doubt whether reasonable men, . . . might arrive at different conclusion, then this very doubt determines the question to be one of fact for the jury and not one of law for the Court. (Citation omitted).

The issue presented for consideration under this point is whether there is sufficient evidence to sustain a verdict for no liability. Relative to this question the evidence sustaining the verdice is that Mrs. Howes was driving within the speed limit, on a very dark night and using her headlights. After going through an intersection and traversing a crosswalk without incident a girl ran fast into the path of defendant's vehicle just after a northbound vehicle passed the defendant. Mrs. Howes was given no warning of the approach of the plaintiff and had no time to take evasive action. The plaintiff struck the front of the car and rolled off the right side onto the ground and was found in the same location where she was struck, approximately 90 feet from the crosswalk. Both the damage to the front of the defendant's vehicle and the injuries to the plaintiff are consistent with a low speed inpact and with the plaintiff being struck close

to where she fell. It is totally unreasonable that such minor damage to the car and minor injury to the plaintiff would have occurred if the defendant's speed would have been greater and if the plaintiff would have been hit while in or near to the crosswalk and would have been thrown 90 feet as claimed by plaintiff.

Plaintiff relies heavily on measurements and calculations that plaintiff's attorney makes in his brief. On cross-examination by plaintiff's attorney the defendant stated that she looked at her speedometer just before the northbound car passed her. (Tr. 301). Plaintiff's counsel then had the defendant indicate on Exhibit D-1 where this would have been. In doing so she said "about here I would say." (Tr. 301). With this information which is obviously and of necessity meant to be approximate, plaintiff has attempted precise measurements and calculations and suggests it was impossible for the defendant to look at her speedometer, observe a car northbound, and see the plaintiff dart in front of her vehicle. His measurement indicates that this would have had to take place within 15 feet while traveling 25 miles per hour. Such an approach is a ploy used by counsel to obtain an approximation from a witness and then to use that approximation in making exact calculations. This is the kind of exercise which received Justice Henroid's disapproval when he said in his opinion that such a procedure "... lays undue

emphasis on split-second calculations indulged in hypothetical questions based on conjecture." Holmes v. Nelson, 7 U.2d 435, 326 P.2d 722, 727 (1958).

Plaintiff's brief claims that defendant was negligent in failing to yield the right-of-way because it is "undisputed in the evidence that plaintiff was in the crosswalk until she reached the center of the street." Plaintiff by her own argument admits that she was not in the crosswalk at the time of the accident. In fact it is disputed that she was in the crosswalk at all since defendant's testimony puts her some 90 feet from the crosswalk when she was struck. This is the evidence that is supported by the jury verdict and the verity of such verdict must therefore be presumed.

On pages 21 and 22 of Plaintiff's brief the Plaintiff attempts to state the evidence most favorable to the defendant. She states that having ample opportunity to do so defendant failed to see the plaintiff until she hit her. To the contrary, the evidence shows that defendant had no opportunity to see the plaintiff due to the dark night, the on-coming vehicle, and plaintiff running directly into her path. Plaintiff also contends the "undisputed evidence" places plaintiff in the crosswalk until she reached the middle of the street and that she was then struck within 15 feet of the crosswalk. This also is not true since the defendant herself testified that the Plaintiff was far from the crosswalk when

seen and struck. This is the testimony the jury obviously believed and which must be viewed favorably by this Court. Plaintiff's counsel then suggests that we speculate with him when he states that "...any split-second delay in defendant's arrival at the point of impact would have prevented the collision, ...". There is no such evidence anywhere in the record nor is any referred to by counsel.

The plain facts were that a girl on a dark night ran into the path of a car that she should have seen and stopped for just as her two girlfriends did and thereby avoid the collision that plaintiff suffered. For this the jury found the plaintiff was negligent and that such negligence caused her accident.

The plaintiff received the jury trial she requested. (R. 105). Whatever party requests trial by jury, that right is guarded jealously by this Court.

> This case having been tried to a jury, they were the exclusive judges of the evidence and of the inferences to be drawn therefrom. It was not the privilege of the Court to disagree with and overrule their action unless the evidence so unerringly pointed to a contrary conclusion that there existed no reasonable basis for the jury's finding. This Court has many times affirmed committment to a policy of reluctance to interfere with Findings of Fact and verdicts rendered by juries and has declared that it should be done only when the matter is so clear as to be free from doubt. (Citations omitted). In Butz v. Union Pac. R.R.

> (citation omitted) we quoted with approval the language of Justice Murphy, speaking for the United States Supreme Court with respect to trial by jury: "* * * a right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by Statute, should be jealously guarded by the Courts." Again in Stickle v. Union Pac. R. R. Co., (citation omitted) we stated "* * * we remain cognizant of the vital importance of the privilege of the trial by jury in our system of justice and deem it our duty to zealously protect and preserve it." Cottrell v. Grand Union Tea Company, 5 U.2d 187, 299 P.2d 622, 626 (1966).

From the rendition of the facts and argument thereon by the plaintiff in her brief it seems to merit the language of this Court in Douglas v. Duvall, 5 U.2d 429, 304 P. 2d 373 (1956) where it is said:

> Plaintiffs' brief recites the facts most favorable to themselves, losers below, which facts were sharply controverted, an approach this Court does not accept. (Citations omitted).

POINT II

THERE IS NO ERROR IN FAILING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 8.

Plaintiff's requested Instruction No. 8 would have instructed the jury that the location of the accident was in a residential area. This fact should have hardly needed instruction since most of plaintiff's witnesses stated that they lived in this vicinity. The Instruction went on to state that one has a duty in a residential area to exercise

reasonable care to observe the presence of children or other persons who may reasonably be expected to be on or near the street upon which defendant's vehicle was being operated.

Plaintiff gives no supporting authority for this Instruction, but as a compelling reason for giving it the plaintiff states that the accident in fact happened in a residential area.

The Instruction was in fact covered by several others that were in fact given. Instruction No. 11 gives the usual definition of negligence requiring one to be reasonable and prudent under the circumstances. (R. 72). Instruction No. 18 explains the requirement of maintaining a proper lookout, to pay attention and to see what is in plain sight. (R.79). Instruction No. 20 explains the duty to yield the right-of-way to a pedestrian in a crosswalk. (R. 81). Instruction No. 22 states that defendant is to operate her vehicle reasonably under the circumstances with regard for the surface and width of the road, the traffic and the actual or potential hazards. Emphasis added. (R. 83) Instruction No. 23 places the duty on a defendant to avoid danger, to be aware and to observe the highway conditions, the presence of pedestrians, and to maintain a lookout for persons in the vicinity. Emphasis added. (R. 84).

These combined instructions cover all the points contained in plaintiff's requested Instruction No. 8 as well

as other points not covered. If any error be found in failing to give Instruction No. 8 such error, in view of the other instructions actually given, cannot reasonably be said to be of consequence or prejudicial.

POINT III

THE LOWER COURT PROPERLY DENIED PLAINTIFF'S MOTION FOR A NEW TRIAL.

The defendant incorporates herein the arguments already set forth in Point I. It is well established that the granting or refusing of a Motion for a New Trial based on insufficiency of evidence is largely within the discretion of the trial court. Moser v. Z.C.M.I., 114 Utah 58, 197 P.2d 136 (1948); Reynolds v. W. W. Clyde & Co., 5 U.2d 151, 298 P.2d 530 (1956). In the case of Gordon v. Provo City, 15 U.2d 287, 291 P.2d 430 (1964), this Court said:

> The purpose of a trial is to afford the parties a full and fair opportunity to present their evidence and contentions and to have the issues in dispute between them determined by a jury. When this objective has been accomplished, and when the trial court has given its approval thereto by refusing to grant a new trial, the judgment should be looked upon with some degree of verity. The presumption is in favor of its validity and the burden is upon the appellant to show some pursuasive reason for upsetting it. (Citations). Under the cardinal and oft-repeated rule of review, we will not disturb the jury's finding so long as it is supported by substantial

> evidence, that is, evidence which, together with the fair inferences that may be drawn therefrom, reasonable minds could conclude as the jury did; (Citations). And we will not reverse the judgment entered thereon unless in arriving at it substantial and prejudicial error was committed in the sense that in its absence there is a reasonable likelihood that there would have been a different result.

In the case of Wellman v. Noble, 12 U.2d 350, 366 P.2d 701 (1961), cited also by plaintiff, the trial court granted a new trial and the Supreme Court affirmed the Court's discretion. The case is cited here as support for the notion that the trial Judge's ruling on the Motion for a New Trial should be affirmed. The Court reasoned as follows:

> . . . since the trial Judge has seen and heard the witnesses and had a first-hand view of all of the evidence, and the proceedings throughout the trial and has ruled on the admissibility of the evidence, and instructed the jury on the law governing their verdict, and had opportunity of observing the tactics of counsel throughout the trial and the jury's reaction thereto, his ruling on a Motion for a New Trial should not be overruled unless it clearly appears that he abused his discretion.

CONCLUSION

The lower Court had an opportunity to grant a new trial if it believed all the circumstances warranted such action, but it has declined to do so. Since the verdict was supported by substantial evidence, together with the fact

that the jury was unanimous in finding the plaintiff negligent, there has been no abuse of discretion and the Court's ruling on the new trial should be sustained. The evidence being considered as a whole points to numerous conflicts. These conflicts must be viewed in a light most favorable to the defendant, having prevailed below. Although conflicting, substantial evidence supports the jury's verdict in this case. Such evidence is to be viewed in the light most favorable to the defendant. Where reasonable minds could have found as the jury did from the evidence before it, the trial court does not abuse its discretion in denying a Motion for a New Trial on the ground of insufficient evidence. The trial Court was not only aware of all of the evidence, but it was able to evaluate it in light of other observations made pending the trial. Based on the sufficiency of evidence and the Court's observations there was no abuse of discretion in refusing to grant a new trial.

Based on the foregoing, defendant respectfully submits the action of the Court and Jury below should be affirmed.

Respectfully submitted,

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